IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 38

JULIUS SALSBURG,

Appellant,

vs.

STATE OF MARYLAND,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF MARYLAND

BRIEF OF APPELLEE

EDWARD D. E. ROLLINS,
Attorney General,

J. EDGAR HARVEY,
Deputy Attorney General,

AMBROSE T. HARTMAN,
Assistant Attorney General,
For Appellee.

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OPINION BELOW

The Opinion of the Court of Appeals of Maryland has not been published in the official Maryland Reports. It is to be found in 94 A. (2d) 280.

JURISDICTIONAL STATEMENT

Appellee adopts the Jurisdictional Statement set forth on pages 1 and 2 of Appellant's Brief.

STATEMENT OF THE CASE

These proceedings originated in the Circuit Court for Anne Arundel County, where the Appellant and two other persons were convicted of bookmaking, which is a misdemeanor by statute. Section 306 of Article 27 of the Maryland Code (1951 Edition). Certain bookmaking paraphernalia was introduced at the time of the trial over objection that it was secured by an illegal search and seizure. No question of a denial of the equal protection of the laws or the denial of any other constitutional right was directly raised at that time. Appellant and the two persons convicted with him appealed to the Court of Appeals of Maryland, where they contended: (1) That their convictions were based upon evidence secured by an illegal search and seizure; and (2) that the statute under which the evidence was held admissible was unconstitutional and was violative of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

The Court of Appeals held that, inasmuch as the two persons convicted with Appellant had demonstrated no interests in the premises searched they could not, under previous decisions of the Court, complain of the illegal search and seizure. The Court of Appeals found that the Appellant Salsburg had demonstrated an interest in the premises as lessee and ordered reargument as to him on the constitutional question. See *Rizzo, et al. v. State*, ... Md. ...., 93 A. (2d) 280. Appellant in his brief on reargument before the Court of Appeals raised only the question of the denial of equal protection of the laws. In his argument before that Court he also raised the question of a denial of due process of law, and the Court of Appeals in its opinion considered both of these contentions. Thus, the Court

of Appeals not only held that equal protection had not been denied but it also found no reason "to hold that the 1951 statute making illegally procured evidence admissible in certain trials in Anne Arundel County, is in conflict with the due process clause of the 14th Amendment". 94 A. (2d) at page 282.

Appellee admits that the record reveals an illegal search and seizure as those terms are defined in prior opinions of the Court of Appeals of Maryland.

SUMMARY OF ARGUMENT

I.

The Amendments to Section 5 of Article 35 of the Maryland Code (1951 Edition) do not deprive one accused of violation of the Gambling Laws in an exempted county of the Due Process of Law guaranteed by the Fourteenth Amendment to the Constitution of the United States by reason of the fact that evidence which would not be Admissible in some parts of the State is admitted to help convict him.

II.

The Act here challenged is not repugnant to the equal protection clause of the Fourteenth Amendment.

ARGUMENT

I

THE AMENDMENTS TO SECTION 5 OF ARTICLE 35 OF THE MARYLAND CODE (1951 EDITION) DO NOT DEPRIVE ONE ACCUSED OF VIOLATION OF THE GAMBLING LAWS IN AN EXEMPTED COUNTY OF THE DUE PROCESS OF LAW GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES BY REASON OF THE FACT THAT EVIDENCE WHICH WOULD NOT BE ADMISSIBLE IN SOME PARTS OF THE STATE IS ADMITTED TO HELP CONVICT HIM.

Up to 1929 Maryland had adhered consistently to the common law rule that the admissibility of evidence in criminal prosecutions is not affected by the manner in which it is obtained. *Meisinger v. State*, 155 Md. 195, 141 A. 536. In 1929, Section 5 of Article 35, *supra*, was enacted to provide State-wide that in misdemeanors evidence obtained by or in consequence of an illegal search and seizure is inadmissible. Left unchanged was the rule in cases of felonies. At the time of Appellant's trial and conviction, the statute in question, Section 5 of Article 35 of the Maryland Code (1951 Edition) had been amended to read as follows:

> "No evidence in the trial of misdemeanors shall be deemed admissible where the same shall have been procured by, through, or in consequence of any illegal search or seizure or of any search and seizure prohibited by the Declaration of Rights of this State; nor shall any evidence in such cases be admissible if procured by, through or in consequence of a search and seizure, the effect of the admission of which would be to compel one to give evidence against himself in a criminal case; provided, however, that nothing in this section shall prohibit the use of such evidence in Baltimore County, Baltimore City, Anne Arundel, Caroline, Carroll, Cecil, Frederick, Harford, Kent, Prince George's, Queen Anne's, Talbot, Washington, Wicomico, and Worcester Counties, in the prosecution of any person for unlawfully carrying a concealed weapon.

> Provided, further, that nothing in this section shall prohibit the use of such evidence in Anne Arundel, Wicomico and Prince George's Counties in the prosecution of any person for a violation of the gambling laws as contained in Sections 303-329, inclusive, of Article 27, sub-title 'Gaming', or in any laws amending or supplementing said sub-title."

The Section was further amended by Chapter 419 of the 1953 Laws of Maryland so as to include Cecil and Wicomico Counties among those exempted from its provisions in the prosecution of certain of the gaming laws and so as to make its provisions inapplicable throughout the State in the prosecution of any person for unlawfully carrying a concealed weapon. The Court of Appeals of Maryland in the case presently appealed held that the exemptions contained in the statute serve to reinstate the common law rule of Maryland, which is that the admissibility of evidence in criminal prosecutions is not affected by the manner in which it is obtained. *Meisinger v. State, supra.*

Appellant ostensibly relies upon the equal protection clause of the Fourteenth Amendment. His explicit argument is that the admission of evidence against him which the statute requires excluded in most of the counties of the State denies him the equal protection of the laws guaranteed by the Fourteenth Amendment. He states that the argument made by Appellee in its Motion to Dismiss this appeal, which was that the case really involves a "balancing of the right of persons to be secure in their privacy against the social need that the criminal law be enforced", does not apply here. However, implicit in his entire argument is the contention that the statute denies due process of law because "the subject matter of the statute impinges upon one of the most fundamental immunities of the citizen". He argues that there is no reasonable difference which would justify the discrimination made by the statute. The

Appellee in its Motion to Dismiss the appeal suggested several reasons to justify the challenged classification. One of these was the recent influx of gamblers into Anne Arundel County. The Appellant's answer to this, set forth at page 26 of his brief, reveals that his real complaint is one involving the application of the due process clause. Thus, he says "the challenged statute through a sort of 'negative direction', contains the kind of 'affirmative sanction' to override the constitutional barrier which violates the due process clause of the 14th Amendment". In support of this he cites *Wolf v. Colorado*, 338 U. S. 25, 93 L. Ed. 1782, where the Court, by way of dictum, acknowledged "that were a State affirmatively to sanction such police incursion into privacy, it would run counter to the guaranty of the 14th Amendment". Appellee finds it necessary, therefore, to discuss the due process question which is thus indirectly raised by Appellant.

That the admission in a criminal prosecution of evidence secured through a search condemned by constitutional provisions similar to the Fourth Amendment to the Constitution of the United States and to Article 23 of the Declaration of Rights to the Constitution of Maryland does not "impinge upon" a citizens' fundamental immunity is illustrated by study of the history of such constitutional provisions. This history reveals that while a number of remedies were made available to victims of illegal entries and searches, one of these was not the exclusion in criminal prosecutions of evidence thereby obtained. Prior to the contrary rule which was announced in *Weeks v. United States*, 232 U. S. 383, 58 L. Ed. 652, under which evidence illegally obtained was held inadmissible in prosecutions in Federal Courts, only one jurisdiction of those in this country and of those composing the United Kingdom and the British Commonwealth of Nations held evidence so

obtained inadmissible. That jurisdiction was the State of Iowa. *State v. Sheridan*, 121 Iowa 164, 96 N. W. 730. The tables in the appendix to the majority opinion in *Wolf v. Colorado*, *supra*, reveal this information. As of the time of the decision in *Wolf v. Colorado*, *supra*, thirty States had rejected the rule announced in the *Weeks'* case and seventeen had adopted it. In *People v. Defore*, 1926, 242 N. Y. 13, 150 N. E. 585, 588-589, Judge Cardozo refused to adopt the rule of the *Weeks* case and said:

> "'We are confirmed in this conclusion when we reflect how far-reaching in its effect upon society the new consequences would be. The pettiest peace officer would have it in his power, through overzeal or indiscretion, to confer immunity upon an offender for crimes the most flagitious. * * * We do not know whether the public, represented by its juries, is today more indifferent to its liberties than it was when the immunity was born. If so, the change of sentiment without more does not work a change of remedy. Other sanctions, penal and disciplinary, supplementing the right to damages, have already been enumerated. No doubt the protection of the statute would be greater from the point of view of the individual whose privacy had been invaded if the government were required to ignore what it had learned through the invasion. The question is whether protection for the individual would not be gained at a disproportionate loss of protection for society. On the one side is the social need that crime shall be repressed. On the other, the social need that law shall not be flouted by the insolence of office. There are dangers in any choice.'"

The Court of Appeals of Maryland has never held that the admission of evidence illegally secured denies the accused a fundamental right. Thus, in *Meisinger v. State*, *supra*, 155 Md. at page 199 decided after the *Weeks* case and before the enactment of Article 35, Section 5, *supra*, the Court of Appeals said:

> "The reason upon which the rule rests is that, in the trial of criminal cases, the admissibility of evidence is to be determined by its pertinency to the issue under consideration, and in cases like the one before us the court is not concerned with the collateral question of how such evidence may have been procured. The question of the guilt or innocence of the accused cannot be affected by its method of procurement, if the evidence offered is in itself germane and pertinent to the issue to be decided."

See also *Lawrence v. State*, 103 Md. 17, 63 A. 96. As originally enacted by Chapter 194 of the 1929 Laws of Maryland, Article 35, Section 5, *supra*, required the exclusion of evidence obtained by an illegal search and seizure in cases of all misdemeanors. After this enactment, the Court of Appeals held that the rule in cases of felonies remained the same but that in cases of misdemeanors the Act required exclusion of evidence illegally obtained. *Marshall v. State*, 182 Md. 379, 35 A. (2d) 115; *Delnegro v. State*, ... Md. ....., 81 A. (2d) 241, 242. The exclusionary rule in prosecutions for misdemeanors is, therefore, one created by the Legislature and not by the judiciary.

In *Wolf v. Colorado, supra*, the Court indicated that the exclusion of evidence illegally obtained in Federal prosecutions is not an explicit requirement of the Fourth Amendment but rather is a rule of court created to implement that Amendment. It was there said at pages 28-29 of 338 U. S.:

> "In Weeks v. United States, 232 U. S. 383, 58 L. ed. 652, 34 S. Ct. 341, L. R. A. 1915B 834, Ann. Cas. 1915C 1177, supra, this Court held that in a federal prosecution the Fourth Amendment barred the use of evidence secured through an illegal search and seizure. This ruling was made for the first time in 1914. It was not derived from the explicit requirements of the

Fourth Amendment; it was not based on legislation expressing Congressional policy in the enforcement of the Constitution. The decision was a matter of judicial implication. Since then it has been frequently applied and we stoutly adhere to it. But the immediate question is whether the basic right to protection against arbitrary intrusion by the police demands the exclusion of logically relevant evidence obtained by an unreasonable search and seizure because, in a federal prosecution for a federal crime, it would be excluded. As a matter of inherent reason, one would suppose this to be an issue as to which men with complete devotion to the protection of the right of privacy might give different answers. When we find that in fact most of the English-speaking world does not regard as vital to such protection the exclusion of evidence thus obtained, we must hesitate to treat this remedy as an essential ingredient of the right. The contrariety of views of the States is particularly impressive in view of the careful reconsideration which they have given the problem in the light of the Weeks decision."

The holding in *Wolf v. Colorado, supra*, was "that in a prosecution in a State court for a State crime the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure". See also *Stefanelli v. Minard*, 342 U. S. 117, 96 L. Ed. 138; *Adams v. New York*, 192 U. S. 575, 48 L. Ed. 585. However, in the *Wolf* case, the Court warned that "were a State affirmatively to sanction such police incursion into privacy it would run counter to the guaranty of the Fourteenth Amendment". It is clear from the context, the Court was referring to the due process clause of that Amendment. Appellant urges that the Act here challenged is in effect a "negative direction" to law enforcement officers to conduct illegal searches and seizures in that it abrogates the legislatively created rule of exclusion in cases of prosecutions for violations of certain of the gambling laws in Anne

Arundel County. While the exemption in isolated individual cases may have the effect attributed to it by the Appellant, there is nothing in the statute which affirmatively sanctions as State policy "police incursion into privacy". One might as well argue that judicial admission of illegally procured evidence or mere legislative failure to act so as to forbid the use of such evidence constituted affirmative sanction. The challenged statute is not of the type condemned in the case of *Ex Parte Rhodes*, Ala., 79 So. 462, where the statute as construed by the Court affirmatively authorized illegal searches and seizures by law enforcement officers. The Court, in *Wolf v. Colorado*, *supra*, and other cases cited above, did not find that the rule followed by most of the States which permits the admission of illegally obtained evidence is such an affirmative sanction to police officers to conduct illegal searches and seizures.

As pointed out above, Article 35, Section 5, *supra*, as originally enacted in 1929 and as in force today, distinguishes between misdemeanors and felonies. As to misdemeanors, the exclusionary rule prevails; as to felonies, it does not. We know of no case in which the contention has been made in a Court of Maryland that the statute as originally enacted is an affirmative sanction for police officers to search the homes of felons and, therefore, denies them due process of law. Likewise, it has never been suggested that the provisions of Section 368 of Article 27 of the Maryland Code (1951 Edition), which exempts prosecutions for violations of the narcotic laws from the exclusionary rule of Article 35, Section 5, *supra*, is unconstitutional as an affirmative sanction for enforcement officers to conduct illegal searches and seizures. It is submitted that to adopt Appellant's argument and to hold that the exemptions contained in the challenged statute are violative of the due process clause as a "negative direction" to law enforce-

ment officers to conduct illegal searches and seizures, this Court must overrule the prior cases in which it held that the Fourteenth Amendment does not forbid the admission of evidence obtained so obtained for it is undoubtedly true that to exclude such evidence in all cases and in all courts would tend to discourage unreasonable searches and seizures. Further, to accept Appellant's argument would cast doubt upon the constitutionality of Article 35, Section 5, *supra*, in its entirety and upon the constitutionality of Article 27, Section 388, *supra*.

In *Wolf v. Colorado*, *supra*, the Court suggested that Congress may have the power by appropriate legislation to negate the exclusionary rule which the Court had formulated to implement the Fourth Amendment. In view of the Court's very positive condemnation of a State statute which would "affirmatively sanction police incursion into privacy", the Court obviously meant that Congress possibly has the power to change the exclusionary rule by an enactment which would authorize the admission in criminal prosecutions of evidence illegally obtained and not by an enactment affirmatively sanctioning illegal searches and seizures. It is submitted that the challenged statute does no more than the converse of what this Court suggested Congress may have the power to do viz: it abrogates a legislatively created rule of evidence and thereby reinstates the judicially created rule.

Appellant makes much of the fact that the trial court made the "pernicious assumption" that the challenged statute gave the police "the right" to illegally enter his premises. This statement by the trial court was erroneous and the Appellee has never contended that the statute confers such a right nor does it so contend now. The Court of Appeals suffers from no such misapprehension, as is manifest from its opinion in the present case. See *Salsburg v. State*, *supra*,

94 A. (2d) at page 282. It is the decision of the lower court from which an appeal is taken and not from the reasons given in support of the decision. It has often been held both by this Court and the Court of Appeals of Maryland that where the decision below is correct, it must be affirmed by the appellate court though the lower tribunal gave a wrong reason for its action. *J. E. Riley Inv. Co. v. Commissioner of Internal Revenue*, 311 U. S. 55, 85 L. Ed. 36; *Securities & Exchange Com. v. Chenery Corp.*, 318 U. S. 80, 87 L. Ed. 626; *Velasco v. Protestant Episcopal Church*, ... Md. ....., 92 A. (2d) 373; *Schriver v. Schriver*, 185 Md. 227, 44 A. (2d) 479.

The statute here involved is directed simply to the admissibility of evidence and does not confer a "right" upon law enforcement officers to invade the privacy of citizens. As was observed in *Wolf v. Colorado, supra*, at page 291 of 338 U. S., although evidence secured by an illegal search and seizure may be held admissible in a State court, the common law provides action for damages against the officer who conducts the search.

II.

THE ACT HERE CHALLENGED IS NOT REPUGNANT TO THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

A. Every legislative act, including those which appear on their face to contravene some specific prohibition of the Constitution, carries with it the presumption of validity and it should not be stricken down unless it is susceptible of no construction which will make it constitutional.

At the outset it is to be observed that it is elementary that every presumption is to be indulged in favor of the validity of a legislative enactment and that the courts will not invalidate a statute until this presumption is overcome beyond a reasonable doubt. In *Screws v. United States*,

325 U. S. 91, 89 L. Ed. 1495, the Court pointed out that an unconstitutional construction is to be avoided if possible:

> "This Court has consistently favored that interpretation of legislation which supports its constitutionality. Aschwander v. Tennessee Valley Authority, 297 U. S. 288, 30 L. Ed. 688; National Labor Relations Board v. Jones & L. Steel Corp., 301 U. S. 1, 81 L. Ed. 893. * * *."

Cases directly in point are those which hold that where a law is attacked as violative of the equal protection clause, there is a presumption in favor of the legislative classification, and if any state of facts can reasonably be conceived to sustain the classification, the existence of that state of facts when the law was enacted must be assumed. Thus, in *Metropolitan Casualty Insurance Co. v. Brownell*, 294 U. S. 580, 584, 79 L. Ed. 1070, 1072, Justice Stone said:

> "It is a salutary principle of judicial decision, long emphasized and followed by this Court, that the burden of establishing the unconstitutionality of a statute rests on him who assails it, and that courts may not declare a legislative discrimination invalid unless, viewed in the light of facts made known or generally assumed, it is of such a character as to preclude the assumption that the classification rests upon some rational basis within the knowledge and experience of the legislators. A statutory discrimination will not be set aside as the denial of equal protection of the laws if any state of facts reasonably may be conceived to justify it. Rast v. Van Deman & L. Co., 240 U. S. 342, 357, 60 L. Ed. 679, 687, 36 S. Ct. 370, L. R. A. 1917A, 421, Ann. Cas. 1917B, 455; State Tax Comrs. v. Jackson, 283 U. S. 527, 537, 75 L. Ed. 1248, 1255, 51 S. Ct. 540, 73 A. L. R. 1464, 75 A. L. R. 1536."

In *Fort Smith L. & T. Co. v. Board of Imp. of Paving Dist.*, 274 U. S. 387, 71 L. Ed. 1112, it was held that a Street

railway company was not deprived of the equal protection of the laws where it was required to pay a State paving assessment which was not imposed upon companies operating in other municipalities. The Court enumerated various conditions which it assumed might exist which would justify the discrimination, and said at page 392 of 274 U. S.:

> "* * * We may not assume in the absence of proof that such differences do not exist. Erb v. Morasch, 177 U. S. 584, 586, 44 L. Ed. 897, 898, 20 Sup. Ct. Rep. 819; Middleton v. Texas Power & Light Co., 249 U. S. 152, 158, 63 L. Ed. 527, 531, 39 Sup. Ct. Rep. 227; Swiss Oil Corp. v. Shanks, 273 U. S. 407, ante, 709, 47 Sup. Ct. Rep. 393.
>
> "There are no facts disclosed by the record which would enable us to say that the legislative action with which we are here concerned was necessarily arbitrary or unreasonable or justify us in overruling the judgment of the state court that it was reasonable. Durham Pub. Serv. Co. v. Durham, supra, 154 [67 L. Ed. 585, 43 Sup. Ct. Rep. 290]."

See also *Alabama State Federation of Labor v. McAdory*, 325 U. S. 450, 465, 89 L. Ed. 1725, 1737; *Carmichael v. Southern Coal and Coke Co.*, 301 U. S. 495, 510, 81 L. Ed. 1245, 1253; *Whitney v. California*, 274 U. S. 357, 370, 71 L. Ed. 1095, 1103.

The Court of Appeals of Maryland follows a similar rule and stated the presumption of constitutional validity in the instant case, 94 A. (2d) at page 283. In *Mt. Vernon Co. v. Frankfort Co.*, 111 Md. 561, 75 A. 105, a statute which forbade employment of any person under fourteen years of age in the mills and factories of the State was attacked as denying equal protection of the laws. The discrimination complained of was the exemption of canning factories *and*

certain of the counties. The Court, in sustaining the act, said at page 570:

> "* * * In *Cooley's Constitutional Lim.* (6th Ed.), page 216, it is said: 'The question whether a law be void for its repugnancy to the Constitution is at all times a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative in doubtful cases.' And again, on page 220, that the Courts 'must assume that legislative discretion has been properly exercised. If evidence was required, it must be supposed that it was before the Legislature when the Act was passed.' In *ex parte Spencer*, 86 Pac. Rep. 896, it was said that: 'The presumption always is that an Act of the Legislature is constitutional, and when this depends on the existence or non-existence of some fact, or state of facts, the determination thereof is primarily for the Legislature, and the Courts will acquiesce in its decision, unless the error clearly appears'."

See also *Brown v. State*, 177 Md. 321, 330-331, 9 A. (2d) 209; *State v. Seney Co.*, 134 Md. 437, 438, 107 A. 189; *State v. Shapiro*, 131 Md. 168, 172, 101 A. 703; *Ruggles v. State*, 120 Md. 553, 561-563, 87 A. 1080.

The Appellant argues that where a statute deals with a fundamental right of a citizen it is not entitled to the presumption of constitutional validity. The cases decided by this Court which the Appellant cites in support of this statement involve an application of one of the first eight amendments to the Constitution of the United States. The present case does not involve an application of the Fourth Amendment inasmuch as this Court has consistently held that the requirements of that Amendment are not incorporated in the Fourteenth. Further, the Appellee submits that the rule does not vary, as stated by Appellant. The true state of the law, as Appellee sees it, is that expressed

by Mr. Justice Stone's footnote in *United States v. Carolene Products Co.*, 304 U. S. 144, 152, 82 L. Ed. 1234:

> "There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth. See Stromberg v. California, 283 U. S. 359, 369, 370, 75 L. Ed. 1117, 1122, 1123, 51 S. Ct. 532, 73 A. L. R. 1484; Lovell v. Griffin, No. 391 this term, decided March 28, 1938 [303 U. S. 444, 452, ante, 949, 954, 58 S. Ct. 666]."

See also *Dennis v. United States*, 341 U. S. 494, 501, 95 L. Ed. 1137, 1143 and cases there cited.

B. Diversification of State laws on a territorial basis is not repugnant to the equal protection clause of the Fourteenth Amendment in the absence of manifest and obvious unreasonableness.

As is said by the Court of Appeals of Maryland in the opinion affirming the instant case, it has always been the policy of the State of Maryland to permit the enactment by the State Legislature "of local laws affecting only one county or the exemption of particular counties from the operation of general laws or some provisions thereof" 94 A. (2d) at page 285.

Cases in which the Court of Appeals has upheld such local laws and in which the question of equal protection was an issue are legion. Many of these contain the type of double classification present in the challenged statute. Some examples are *Chappel Chem. & Fertilizer Co. v. Sulphur Mines Co. of Virginia*, 85 Md. 684, 36 A. 712 (a rule peculiar to Baltimore City requiring all civil cases to be tried without a jury unless a jury trial is specifically requested); *Stevens v. State*, 89 Md. 669, 674, 43 A. 929 (statute made the possession of certain game at certain times a crime and

excepted some counties from its operation)[1]; *Mt. Vernon Co. v. Frankfort*, supra (statute forbidding the employment of persons under fourteen years of age in the mills and factories of the State, exempting canning factories as well as certain of the counties); *Sweeten v. State*, 122 Md. 634, 90 A. 180 (statute providing an eight hour day for laborers upon public works and applying to Baltimore City only)[2]; *American Coal Co. v. Allegany County*, 128 Md.

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[1] 89 Md., at page 674:

"It cannot be successfully contended that the law now under consideration is unconstitutional, because it operates unequally upon the inhabitants of the several parts of the State, and that it discriminates against the residents of Baltimore City, by reason of the fact that a number of counties are excepted from its operation. It has long been the policy of the State of Maryland to enact local laws affecting only certain counties, or to exempt particular counties or localities from the operation of general laws or of some of the provisions thereof."

[2] 122 Md., at pages 640-641:

"* * * We must bear in mind that we are dealing with a municipal corporation and as is said in *Cooley's Const. Limitations* (7th Ed.), page 555: 'The authority that legislates for the State at large must determine whether particular rules shall extend to the whole State and all its citizens, or, on the other hand, to a subdivision of the State or a single class of its citizens only. The circumstances of a particular locality, or the prevailing public sentiment in that section of the State, may require or make acceptable different police regulations from those demanded in another, or call for different taxation, and a different application of the public moneys. The Legislature may therefore prescribe or authorize different laws of police, allow the right of eminent domain to be exercised in different cases and through different agencies, and prescribe peculiar restrictions upon taxation in each distinct municipality, provided the State Constitution does not forbid.' * * * The fact that other agencies are not so restricted provokes no unlawful discrimination, so long as the statute prescribes a rule of conduct which applies alike to all who contract to do work for the particular municipality and alike to all who are employed to labor on such work. The case of *Penn Bridge Co. v. U. S.*, 29 App. Cases (Dist. Columbia), 452, is an illustration of this principle. Congress passed an eight-hour labor law, somewhat similar to the Maryland statute, applicable only to government work in the District. The fact that its application was thus limited did not invalidate it."

564, 98 A. 143 (statute applying to two counties only, which provided a relief fund for coal miners only)[3]; *State v. Shapiro*, *supra* (statute regulating junk dealers, requiring a different license fee according to size of city); *Brown v. State*, *supra* (statute imposing license tax on hawkers and peddlers, exempting peddlers of oysters, fish, fruits and vegetables).[4] See also *Ruggles v. State*, *supra*; *Grossfeld v. Baughman*, 148 Md. 230, 235, 129 A. 370; *Robey v. Broerman*, 181 Md. 325, 331, 29 A. (2d) 837. Compare *Neuenschwender v. Washington Suburban Sanitary Commission*, 187 Md. 67, 48 A. (2d) 392, where the Court of Appeals sustained the constitutionality of a statute which applied to only three of the counties and which provided that no suit for damages shall be maintained against a municipal corporation unless written notice of the claim shall be presented within ninety days after the injury or damage. The fact that no question of denial of the equal protection of the laws was raised in that case illustrates

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[3] 128 Md., at page 560:

"* * * 'The restriction of the law to Allegany and Garrett Counties can prove no stumbling block for such local limitations are recognized as legal and proper, if all within the selected locality are treated alike and the locality itself is broad enough to work no harmful discrimination. * * * The classification, therefore, is in fact all-inclusive; it rests upon a natural, reasonable and essential basis of difference between this and other industries, and is therefore sound'."

[4] 177 Md., at pages 330-332:

"* * * the court could not on anything now before it find unconstitutional discrimination against those not exempted. * * *

"An objector on this ground has the burden of demonstrating the existence of the unconstitutionality. 'Every presumption is to be made in support of the theory that the General Assembly has validly and properly exercised its powers.' * * *

"* * * The mere existence of exemptions does not therefore establish unconstitutional discrimination. There must be more. And no more is made to appear to the court. The objection has not, therefore, been sustained."

the extent to which such local legislation is accepted in Maryland as a part of its system of law.

The enactments of the General Assembly of Maryland fall into two accepted classifications; viz., public local laws and public general laws. Public general laws are codified in the Annotated Code of Maryland (1951 Edition). The public local laws are codified in the Code of Public Local Laws of Maryland (1930 Edition); the various counties also publish codifications of the local laws which apply to them. A most superficial perusal of these codifications discloses the extent to which Maryland follows a policy whereby local needs and desires are satisfied in the State Legislature by the passage of local laws and by the exemption of certain counties from State-wide laws. Only Baltimore City and Montgomery County have elected to accept charter form of local self-government, as provided in Article 11A of the Maryland Constitution. While the Maryland Code purports to be a compilation of public general laws, it, in fact, contains many statutory exemptions which have the effect of making many of the provisions of that Code local in nature. Some of the laws which appear in the Public General Laws as compiled in the 1951 Code and which apply differently in different counties are as follows:

(1) Article 2B regulates the sale of alcoholic beverages and the requirements as to when sales are permissible, types of licenses, license fees, etc., vary from county to county and sometimes from city to city in a manner which illustrates the accommodation of local desires and needs by the legislature.

(2) Article 27, Sections 578 through 610B, the law relating to Sabbath breaking varies from county to county and often applies differently in towns and municipalities within the same county.

(3) Article 27, Section 566, which is a criminal statute applying to junk yards, exempts five counties from its provision.

(4) Article 27, Section 545, a criminal statute relating to the placing of dangerous material upon the highways, exempts two counties.

(5) Article 27, Section 146, which makes it a crime to enter the property of another and to act in a disorderly manner, applies to six of the twenty three counties only.

(6) Article 27, Section 136, the criminal statute prohibiting interference with systems of water supply, exempts one county from its provision.

(7) Article 27, Section 672, setting up a special procedure for proceeding by information in criminal cases, does not apply in Baltimore City and Baltimore County.

(8) Article 51, Section 7, grants the right of jury service to women but exempts ten counties so that women may not serve on juries there.

(9) Article 51, Section 9, provides a different method of selecting jury panels for the various counties.

Many other instances could be mentioned. The index to the 1953 laws of Maryland reveals that during the greater portion of the session the General Assembly was concerned with local legislation. The compilation of those laws which are classed as public local laws in the Code of Public Local Laws of Maryland (1930 Edition) is impressive testimony

to the extent to which the General Assembly of Maryland enacts laws which are diversified territorially. This compilation consists of a two volume set, which runs to 5,334 pages. Many more local laws have been enacted since 1930 at each session of the General Assembly. Space does not allow a detailed discussion of the manner in which local legislation affects the various counties. Suffice it to say that these local laws run the gamut of those things within the province of the Legislature, from providing public health, safety and welfare to the providing of procedure in the local courts.

The history of the challenged statute is illustrative of the manner in which the public general laws are made to conform with local desires and needs. As enacted by Chapter 194 of the 1929 Laws of Maryland, the statute required that in the trial of all misdemeanors throughout the State evidence procured by illegal search and seizure shall be deemed inadmissible. The Act was amended by Chapter 752 of the 1947 Laws of Maryland to exempt from its provision prosecutions for unlawfully carrying a concealed weapon in Baltimore County. Baltimore City and thirteen counties joined Baltimore County in this exemption by the enactment of Chapter 145 of the 1951 Laws of Maryland. Chapter 704 of the 1951 Laws of Maryland exempted from the provisions of the statute prosecutions for violation of certain of the gambling laws in Anne Arundel County. Wicomico and Prince George's Counties joined Anne Arundel County in this exemption by the enactment of Chapter 710 of the Acts of 1951. Chapter 59 of the 1952 Laws of Maryland enacted Section 5A of Article 35 of the Maryland Code (1951 Edition), the effect of which was to exempt from the provision of the challenged statute prosecutions for unlawfully carrying a concealed weapon throughout the

State. With the enactment of Chapter 84 of the 1953 Laws of Maryland, Worcester County joined Anne Arundel, Wicomico and Prince George's Counties in the exemption relative to the gambling laws. The history of this Act follows a familiar pattern, and this pattern has an accepted place in the legislative process of the State of Maryland.

Appellant's contention that the challenged statute deprives him of the equal protection of the laws guaranteed by the Fourteenth Amendment does not find support in the decisions of this Court or the Court of Appeals of Maryland. The Court of Appeals decisions have been discussed earlier in this brief. The challenged statute deals with the admissibility of evidence. The decisions of this Court, discussed hereinafter, reveal that the equal protection clause allows the State a wide latitude in diversifying laws which relate to the administration of justice and which provide systems of procedure in the State courts. The Appellant has not cited, and the Appellee has been unable to find, a single case in which this Court has condemned a statute which dealt with those subject matters and which made territorial classifications. On the other hand, there is a long line of cases upholding statutes which diversify laws territorially. The Appellant cites these cases, but attempts to distinguish them, arguing that the reasonableness of the classification was assumed by this Court without discussion because it was so apparent or was expressly found in the unequal distribution of population. It is Appellee's contention that the lack of any mention of a rational basis for the classification in these cases illustrates an application of the presumption that the Legislature was acting upon facts known to it which would justify the discrimination. The cases applying this presumption to other types of classification have been discussed earlier in this brief.

In *Missouri v. Lewis*, 101 U. S. 22, 25 L. Ed. 989, the Court found that equal protection was not denied by provisions of the Constitution and Laws of Missouri which allowed an appeal to the Supreme Court of the State from any final judgment of any Circuit Court and where certain counties were excepted from these provisions and a separate appeal court was provided for them. The Court did not find a reasonable ground of difference, but apparently assumed that it existed. The Court said:

> "If, however, we take into view the general objects and purposes of the 14th Amendment, we shall find no reasonable ground for giving it any such application. These are to extend United States citizenship to all natives and naturalized persons, and to prohibit the States from abridging their privileges or immunities, and from depriving any person of life, liberty or property without due process of law, and from denying to any person within their jurisdiction the equal protection of the laws. It contemplates persons and classes of persons. It has not respect to local and municipal regulations that do not injuriously affect or discriminate between persons or classes of persons within the places or municipalities for which such regulations are made. * * *
>
> "We might go still further, and say, with undoubted truth, that there is nothing in the Constitution to prevent any State from adopting any system of laws or judicature it sees fit for all or any part of its territory. If the State of New York, for example, should see fit to adopt the civil law and its method of procedure for New York City and the surrounding counties, and the common law and its method of procedure for the rest of the State, there is nothing in the Constitution of the United States to prevent its doing so. This would not, of itself, within the meaning of the 14th Amendment, be a denial to any person of the equal protection of the laws. If every person residing or being in either

portion of the State should be accorded the equal protection of the laws prevailing there, he could not justly complain of a violation of the clause referred to. For, as before said, it has respect to persons and classes of persons. It means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances.

"The 14th Amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversities in these respects may exist in two States separated only by an imaginary line. On one side of this line there may be a right of trial by jury, and on the other side no such right. Each State prescribes its own modes of judicial proceeding. If diversities of laws and judicial proceedings may exist in the several States without violating the equality clause in the 14th Amendment, there is no solid reason why there may not be such diversities in different parts of the same State. * * *"

In *Hayes v. Missouri*, 120 U. S. 68, 30 L. Ed. 578, the Court refused to find a denial of the equal protection of the laws where the statute in question provided that in capital cases in cities having a population of one hundred thousand inhabitants the State shall be allowed fifteen peremptory challenges to jurors, while elsewhere in the State eight peremptory challenges where allowed in such cases. The Court expressly found a rational basis for the classification in the population difference.

In *Chappel Chem. & Fertilizer Co. v. Sulphur Mines Co. of Virginia, supra*, the Court upheld the rule, peculiar to Baltimore City, requiring all civil cases to be tried without a jury unless one was specifically requested. The question of a rational basis for the classification was not discussed. In *Mallett v. North Carolina*, 181 U. S. 589, 598-599, 45 L. Ed.

1015, 1020, the Court held that a statute which allowed the State an appeal from the granting of a new trial to an accused in criminal cases was not a denial of the equal protection where this right of appeal was given in one district of the State and not in another. The Court simply quoted from *Missouri v. Lewis, supra*, and did not discuss the necessity for a rational basis for the classification, much less attempt to find one.

In *Ocampo v. United States*, 234 U. S. 91, 58 L. Ed. 231, the Court did not find that the equal protection requirement was infringed by a law which denied to the inhabitants of Manila the right to a preliminary examination in criminal cases, which right was accorded to all other persons in the Philippine Islands. The Court did not attempt to find a rational basis for the discrimination although it was probably present in population differences, and said, through Justice Pitney, at page 98 of 234 U. S.:

> "That the requirement of an indictment by grand jury is not included within the guaranty of 'due process of law' is, of course, well settled. * * *
>
> "It is contended that since act No. 612 denies to the inhabitants of Manila the right to a preliminary examination which is accorded to all other people in the Islands, it denies the equal protection of the laws guaranteed by the act of Congress. But it was long ago decided that this guaranty does not require territorial uniformity. * * *"

See also *Gardner v. Michigan*, 199 U. S. 325, 333-334, 50 L. Ed. 212, 217 (no discussion of the reasonableness of the classification and citing *Missouri v. Lewis, supra*); *Morris v. Alabama*, 302 U. S. 642, 82 L. Ed. 499 (a per curiam dismissal of an appeal, citing *Missouri v. Lewis, supra*, and *Hayes v. Missouri, supra*); *Jannett v. Hardie*, 290 U. S. 602-603, 78 L. Ed. 529 (a per curiam dismissal of an appeal,

citing *Missouri v. Lewis, supra*, and *Hayes v. Missouri, supra.*)

There are a number of cases which hold that a State may vary, from one locality to another, the punishment for the same criminal act and may make an act a criminal offense when committed in one locality which would not be so if done in another. This Court, even before the adoption of the Twentieth Amendment to the Constitution of the United States, consistently held that the States under the police power have absolute authority over the sale and manufacture of alcoholic beverages within their borders and might, by local option law, prohibit the same in certain localities while allowing it in others. *Ohio, ex rel. Lloyd v. Dollison*, 194 U. S. 445, 48 L. Ed. 1062; *Rippey v. Texas*, 193 U. S. 504, 48 L. Ed. 767; *Mugler v. Kansas*, 123 U. S. 623, 31 L. Ed. 205. Appellant, in a footnote at page 31 of his brief, distinguishes these cases on the basis that they are in a different category. However, if this distinction is valid, categories are tyrannical indeed. A State also has absolute control over gambling and should as well be allowed to prohibit it conditionally.

If "the odds 'on the bobtailed nag' are the same whether the bet is made in Annapolis * * * or Cumberland", it is equally true that the effects of a given quantity of "moonshine" remains constant regardless where consumed.

In *People, ex rel. Armstrong v. Warden of the City Prison of New York, N. Y.*, 76 N. E. 11, the traverser was convicted under a law which regulated employment agencies in cities of two classes only. He sought release on habeas corpus, contending that the statute denied equal protection to residents of cities falling within the two classes. The Court refused to so hold and said:

"* * * it seems to be well settled in this court and in the federal court that the equality within the contemplation of the 14th amendment does not necessarily include a territorial equality, and that legislation which, though limited in the sphere of its operation, affects alike all persons similarly situated within such sphere is valid. * * * Criminal laws are not necessarily unconstitutional, even if they bear unequally upon persons in different parts of the state. The evil which the legislature may have in view in passing such laws may exist only in the great cities of the state, and have no existence in rural districts."

See also *People v. Havnor*, N. Y. 43 N. E. 541; *Surratt v. Commonwealth*, 187 Va. 940, 48 S. E. (2d) 362; *Broadfoot v. City of Fayetteville*, N. C., 28 S. E. 515.

In *Armstrong v. State*, 248 Ala. 124, 26 So. (2d) 874, it was held that a statute authorizing condemnation of an automobile transporting intoxicating beverages did not violate the equal protection clause by reason that such illegal transportation in a dry county subjected the automobile to confiscation while in a wet county it was subject to condemnation only if the liquor was being transported for unlawful sale or without the required stamps.

In *People v. Hanrahan*, Mich., 42 N. W. 1124, a State law and city ordinance, which provided different penalties for the keeping of a house of ill fame, were held not to deny the equal protection of the laws, and the Court said at page 1126 of 42 N. W.:

"* * * The Legislature has power to declare that certain acts committed in a particular locality shall constitute a criminal offense and shall be punished as a felony; while the same act, if done in another locality

or section of the state, would not be a criminal offense at all."

For other cases allowing the imposition of different punishment in different parts of the State for the same offense, see *People, ex rel Ward v. McCann*, 117 Misc. Rep. 798, 193 N. Y. S. 387; *People, ex rel. Kipnis v. McCann*, 199 App. Div. 30, 191 N. Y. S. 574, affirmed 138 N. E. 422.

Appellant complains of the "classification within a classification" made by the challenged statute. A double classification does not of itself invalidate a law. In *People v. Pennock*, Mich., 293 N. W. 759, an ordinance of the City of Detroit which regulated the sale of contraceptive articles by permitting only druggists operating a bona fide drugstore with a prescription department to conduct such sales was attacked by pharmacists who desired to sell the articles in stores other than those described. The Court found a rational basis for the "classification within a classification" and refused to strike down the ordinance. A number of the cases previously cited contains such double classification. See also *Rosenthal v. New York*, 226 U. S. 260, 57 L. Ed. 212.

C. There is a rational basis for the territorial and subject matter classifications made in the challenged statute.

The challenged statute contains a territorial classification in that the exemption applies to Anne Arundel County only and a subject matter classification in that the exemption applies to prosecutions for violations of only certain of the gambling laws; viz., bookmaking, the keeping of a gambling table, the keeping of a house, etc., for gambling

Article 27, Sections 303-329 of the Maryland Code (1951 Edition). The Appellant first complains that no rational basis may be conceived for the territorial classification. The Appellee suggests that a rational basis is found in the recent increase in gambling activity in the exempted county. Anne Arundel County is immediately adjacent to Baltimore City. In order to discourage gambling violations, the Criminal Court of Baltimore has in the past several years adopted a policy of imposing more prison sentences and of increasing the length of the sentences imposed upon those convicted of gambling activity. This is accomplished by imposing the maximum prison sentence for the substantive offense and by the more extensive use of indictments charging conspiracy. Conspiracy carries a maximum sentence of ten years (Article 27, Section 46 of the Maryland Code, 1951 Edition), while the usual maximum penalty for the substantive violation is one year (See Article 27, Sections 306, 311, 312, 425 and 427). Recent appeals from the Criminal Court of Baltimore to the Court of Appeals in which those convicted of gambling violations complained that their sentences were excessive illustrate this trend. See, for example, *Hurwitz v. State*, ... Md. ...., 92 A. (2d) 575, 581.

The prospect of heavier prison sentences has undoubtedly caused many gamblers to remove their operations from Baltimore City to adjacent Anne Arundel County. The greater part of that County is rural in nature and the bucolic setting affords many retreats ideally suited for the clandestine operation of gambling enterprises which are difficult of detection. The County is especially inviting to gamblers who reside in Baltimore because of its proximity to that City. The Hon. William L. Henderson, Associate Judge of the Court of Appeals of Maryland, suggested, at

the time of the original argument of the instant case, that the Legislature might well have taken cognizance of the recent influx of gamblers into Anne Arundel County and that this furnished one rational basis for the classification. Appellant, at page 25 of his brief, states that there is no proof in the record of an influx of gamblers into Anne Arundel County. It it submitted that such proof is unnecessary. The Courts in applying the presumption of constitutional validity hold that "the burden of establishing the unconstitutionality of a statute rests on him who assails it", that where certain differences are called to the attention of the Court in support of a classification the Court "may not assume in the absence of proof that such differences do not exist", and that a statutory discrimination will not be set aside "if any state of facts reasonably may be conceived to justify it". *Fort Smith L. & T. Co. v. Board of Imp. Paving Dist., supra; Metropolitan Casualty Ins. Co. v. Brownell, supra.* The Appellee submits most earnestly that the matters above set forth furnish a rational basis for the classification, both as to territory and as to the evil which is sought to be corrected.

The subject matter exemption made by the challenged statute does not apply to prosecutions for violations of the State-wide lottery law. See Article 27, Sections 423-438 of the Maryland Code (1951 Edition). Nor does the exemption apply to prosecutions for violations of local laws applicable to Anne Arundel County which prohibit the making of book on the result of any horse race in the County and which prohibit "crap" games there. See Sections 338 and 339, Code of Public Local Laws of Anne Arundel County (1947 Edition). Appellant complains that the effect of this is to create "second and third classifications", which have no rational basis. It is to be noted that while Appellant complained of the classification as to the crime

of gambling before the Court of Appeals of Maryland, he raised no contention relative to the classification or discrimination made between bookmaking and lottery. This contention is made for the first time in Appellant's brief and was not made at the time he filed his brief entitled "Statement as to Jurisdiction". His complaint relative to the two Sections of the local law is without merit inasmuch as these Sections are practically identical to several of the Sections of the State-wide law to which the exemption of the challenged statute applies. Thus, Section 315 of Article 27 proscribes the playing of the game of "craps" and Section 306 of Article 27 forbids the making of book on the horse races. Indictments in Anne Arundel County are drawn around the State-wide law, as witness the instant case.

There is a difference in the manner in which a lottery enterprise, as distinguished from a bookmaking enterprise, is conducted which would furnish a rational basis for the subject matter classification here involved. A lottery enterprise necessarily involves a great deal of open and overt activity which is not present in bookmaking. Contact must be had with the wagerer so that the lottery slip may be sold. The buyer of the lottery number retains a slip as does the seller. Hence, there is a claim of command, including "runners", "pick-up" men and "writers". Law enforcement officers become familiar with the pattern of operation of a lottery and, have less difficulty in establishing the probable cause necessary for the issuance of a warrant than they do in cases of bookmaking, where the only activity is the telephone call to the bookmaker's den. See *Bratburd v. State*, 193 Md. 352, 356-357, 68 A. (2d) 446, where the Court of Appeals described the overt indicia of a lottery operation. That open and overt activity is often a necessary part of a lottery operation is indicated by three

cases awaiting this Court's consideration during the present term and in which the Court is asked to decide whether radio and television give-away programs are lotteries. *F.C.C. v. American Broadcasting Co., Inc.; F.C.C. v. National Broadcasting Co., Inc.; F.C.C. v. Columbia Broadcasting System, Inc.*, Nos. 117-119, October Term, 1953.

The gambling cases decided by the Court of Appeals of Maryland in the 1951 and 1952 Terms of that Court illustrate that the operation of a lottery involves more open activity than does the making of book and that those engaged in lottery are, therefore, easier to apprehend than those engaged in the latter enterprise. Of the cases involving gambling during these two Terms of Court, some twenty-nine were appeals from convictions of violations of the lottery laws, while approximately six were appeals from bookmaking convictions. These cases reveal that the open activity involved in lottery violations follows such a pattern that arrests and searches are often sustained without the necessity of a warrant and that, where a warrant is required, it is not too difficult to show probable cause for its issuance. This usual pattern of activity is that of a "pick-up man" receiving lottery slips from a "runner" and the "pick-up man" reporting to headquarters with the lottery slips contained in what is usually described as a "brown paper bag". Often the activity involves the actual sale and exchange of the slips before the eyes of police officers who are lurking near by. On the other hand, the bookmaker's practice is to remain in his room behind closed doors and to receive his business over the telephone.

The comments made in the last paragraph are borne out by the cases decided in the 1951 and 1952 Terms of the Court of Appeals of Maryland. During those two Terms, the Court held that lottery activity observed by the police afforded probable cause for the issuance of a warrant in

the following cases. *Fleming v. State*, ... Md. ..., 92 A. (2d) 747; *Martini v. State*, ... Md. ..., 92 A. (2d) 456; *Hayette v. State*, ... Md. ..., 85 A. (2d) 790; *Lee v. State*, ... Md. ..., 84 A. (2d) 63; *Bland v. State*, ... Md. ..., 80 A. (2d) 43. It was held in six cases decided during those two terms of Court that the lottery violations were committed in the presence of the police so that a warrant was not required. *Bradley v. State*, ... Md. ..., 96 A. (2d) 491; *Yanch v. State*, ... Md. ..., 93 A. (2d) 749; *Eisenstein v. State*, ... Md. ..., 92 A. (2d) 739; *Griffin v. State*, ... Md. ..., 92 A. (2d) 743; *Robinson v. State*, ... Md. ..., 88 A. (2d) 310; *Shelton v. State*, ... Md. ..., 84 A. (2d) 76. Other appeals from lottery convictions during those two terms of Court in which the question of an illegal search was not raised and in which the legality of the arrest or the probable cause for the issuance of the search warrant was patent are: *Noel v. State*, ... Md. ..., 96 A. (2d) 7; *Berry v. State*, ... Md. ..., 95 A. (2d) 319; *King v. State*, ... Md. ..., 93 A. (2d) 553; *Bell v. State*, ... Md. ..., 86 A. (2d) 567; *Brown v. State*, ... Md. ..., 88 A. (2d) 469; *Moore v. State*, ... Md. ..., 87 A. (2d) 577; *Saunders v. State*, ... Md. ..., 87 A. (2d) 618.[*] Appeals from convictions of bookmaking during the same period number approximately six only. *Carpenter v. State*, ... Md. ..., 88 A. (2d) 180; *Saum v. State*, ... Md. ..., 88 A. (2d) 562; *Curreri v. State*, ... Md. ..., 85 A. (2d) 454; *Kershaw v. State*, ... Md. ..., 85 A. (2d) 783; *Goss v. State*, ... Md. ..., 84 A. (2d) 57; *Meade v. State*, ... Md. ..., 84 A. (2d) 582.

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[*] Other appeals from convictions of substantive violation of the lottery laws during the 1951 and 1952 Terms are: *Lingner v. State*, ... Md. ...., 86 A. (2d) 888; *Cross v. State*, ... Md. ...., 86 A. (2d) 891; *Delnegro v. State*, ... Md. ...., 81 A. (2d) 241. Appeals from convictions of conspiracy to violate the lottery laws during those terms are: *Comi v. State*, ... Md. ...., 97 A. (2d) 129; *Adams v. State*, ... Md. ...., 97 A. (2d) 281; *Rouse v. State*, ... Md. ...., 97 A. (2d) 285; *Scarlett v. State*, ... Md. ...., 93 A. (2d) 753; *Hurwitz v. State*, ... Md. ...., 92 A. (2d) 575; *McGuire v. State*, ... Md. ...., 92 A. (2d) 582.

The Appellee submits most earnestly that the comparatively small number of bookmaking convictions during the 1951 and 1952 Terms of the Court of Appeals of Maryland illustrates that this type of gambling enterprise is conducted more furtively, is, therefore, more difficult of detection and that this difference between it and the operation of a lottery furnishes a rational basis for the subject matter discrimination made in the challenged statute.

If the subject matter classification under discussion abridges the right of the equal protection of the laws, then likewise the classification as to misdemeanor and felony which the challenged statute has contained since its enactment in 1929 must also abridge that right. The primary discrimination contained in Section 5, Article 35, *supra*, is that it serves to exclude evidence illegally secured in prosecutions for misdemeanors anywhere in the State, while in prosecutions for felonies such evidence remains admissible. The distinction between felonies and misdemeanors follows no rational pattern in the State of Maryland. Only those crimes are felonies which were such at common law or have been so declared by statute. *Bouser v. State*, 136 Md. 342, 110 A. 854. It is thus left to the Legislature to determine whether a given crime shall be a felony or a misdemeanor. Because of this, the distinction between a felony and a misdemeanor often has become meaningless when considered in terms of the harmful tendency of the conduct condemned or in terms of the degree of punishment imposed. Many examples of this appear in Article 27 of the Maryland Code (1951 Edition). For example, larceny to the value of $25.00 and upwards is declared a felony punishable by a sentence of not more than fifteen years (Section 405 of Article 27), and larceny of any pipe attached to any store, warehouse, etc., is declared a felony

punishable by imprisonment of not less than one year nor more than eight (Section 417 of Article 27). On the other hand, a person convicted of a third offense against the narcotic laws receives a mandatory sentence of not less than ten years and such a violation is a misdemeanor (Section 389 of Article 27). Prior to the enactment of Chapter 402 of the 1943 Laws of Maryland, assault with intent to rape assault with intent to murder, and assault with intent to rob were misdemeanors. Assault with intent to rape, although a misdemeanor, carried a possible death penalty (Section 12, Article 27, Maryland Code (1939 Edition)). At the same time, larceny to the value of $25.00 and upwards was deemed a felony, punishable by a sentence of not more than fifteen years. See Section 367 of Article 27, Maryland Code (1939 Edition). Many more instances might be cited.

It is thus apparent that there is more of a rational basis for the discrimination between lottery and bookmaking than there is for the statute's basic discrimination between felonies and misdemeanors.

CONCLUSION

Upon the facts and the foregoing authorities, it is respectfully contended, that the assailed law does not deny the Appellant any rights guaranteed to him by the Constitution of the United States, and that the judgment of the Court of Appeals of Maryland should be affirmed.

Respectfully submitted,

EDWARD D. E. ROLLINS,
Attorney General,

J. EDGAR HARVEY,
Deputy Attorney General,

AMBROSE T. HARTMAN,
Assistant Attorney General,
For Appellee.